U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MALVIN D. JACKSON and DEPARTMENT OF THE NAVY, CONSOLIDATED CIVILIAN PERSONNEL SERVICES, Bethesda, MD

Docket No. 01-1551; Oral Argument Held September 19, 2002; Issued November 21, 2002

Appearances: *Malvin D. Jackson, pro se*; *Thomas G. Giblin, Esq.*, for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for a merit review of his claim under 5 U.S.C. § 8128.

On November 30, 1987 appellant, then a 36-year-old electrician, filed a claim for a traumatic injury, alleging that on November 12, 1987 he slipped on a sheet of ice covered by snow while coming down a flight of stairs while in the performance of duty. Appellant sustained injuries to his right leg noting that he twisted it and the bone was broken. The Office accepted appellant's claim for a fracture of the right ankle and peroneal tendinitis. Appellant returned to light-duty basis on January 18, 1988. Appellant suffered a recurrence of disability on August 21, 1991 and received compensation benefits for wage loss and returned to work on September 16, 1991.

Appellant was subsequently placed on the periodic rolls and received a schedule award on December 16, 1994 for 18 percent permanent impairment of his right lower extremity.

By letter dated January 13, 1994, appellant requested a hearing, which was held on July 12, 1995.

By decision dated October 11, 1995, the Office hearing representative directed that the Office refer appellant to an appropriate medical specialist for a second opinion report to resolve the issue of whether appellant's November 12, 1987 injury was related to the condition affecting his right knee and the extent if any of permanent impairment to the right leg as a result of the accepted injury.

By letter dated January 3, 1996, the Office referred appellant to Dr. David Johnson, a Board-certified orthopedic surgeon, for a second opinion examination. In a January 18, 1996 report, Dr. Johnson indicated that appellant's knee condition was not related to the employment injury, that he had reached maximum medical improvement and he could work eight hours a day.

By decision dated January 29, 1996, the Office denied appellant's claim for an additional schedule award and denied appellant's claim that his knee condition was causally related to his November 12, 1987 work injury.

In an undated letter received by the Office on March 6, 1996,[1] appellant filed a request for a hearing, which was held on September 9, 1996.

In a statement dated August 12, 1996, Pietro Magri, appellant's foreman, indicated that appellant complained of both knee and ankle problems since the work-related injury.

By decision dated November 25, 1996, the Office hearing representative found that appellant had not submitted sufficient medical evidence to establish that his right knee condition was due to his work-related injury or that he had more than an 18 percent impairment of the right lower extremity for which he received a schedule award and affirmed the Office's January 29, 1996 decision.

By letter dated November 25, 1997, appellant requested reconsideration and submitted a June 8, 1997 report from Dr. Frank B. Watkins, a Board-certified orthopedic surgeon and appellant's treating physician, and a November 21, 1997 report from Dr. Karenga Lemmons, Board-certified in internal medicine; along with additional documents.

In his November 21, 1997 report, Dr. Lemmons noted appellant's history of injury and treatment. He explained that appellant injured his right leg, ankle and knee on November 12, 1987 and this resulted in a comminuted right lateral malleolar fracture of the ankle. Dr. Lemmons opined that there was a great probability that the right knee was injured at the same time based upon extensive medical reports involving the right knee over the past 10 years. He indicated that he agreed that appellant sustained a permanent disability of 11 percent to his right lower extremity secondary to the injuries sustained to his right knee at the time of the work injury.

In the June 8, 1997 report, Dr. Watkins, since November 13, 1987, indicated appellant's last follow-up visit was on January 29, 1990. He stated that appellant initially reported that he had injured his right ankle when he fell while stepping off an icy sidewalk curb at work. Dr. Watkins noted that x-rays taken on November 12, 1987 were positive for lateral malleolar fracture on the right ankle and he was treated with manipulation and casting. He indicated that the initial physical examination confirmed the clinical findings of antalgic gait and right lateral ankle swelling. Dr. Watkins stated that appellant's past medical history was negative for any right knee and right ankle injuries prior to the November 12, 1987 injury. He indicated that his therapeutic management of appellant's painful right lower extremity initially focused more on

[1] The envelope was stamped February 28, 1996.

his right ankle than his right knee. Dr. Watkins explained that appellant's right ankle pain was more severe and demanded more attention initially, noting that the right ankle fracture was treated with casting and then with physical therapy. He indicated that his therapeutic management then shifted to appellant's right knee symptoms after appellant's right ankle fracture recovery, noting that his return to work required prolonged walking and standing. Dr. Watkins indicated that on appellant's August 5, 1988 visit; he requested authorization for a magnetic resonance imaging (MRI) and arthroscopy on appellant's right knee in order to determine the cause of appellant's right knee pain, suspecting internal derangement of the right knee and found the MRI findings were positive for degenerative changes in the menisci. He stated that it was his opinion that appellant's right knee symptoms and condition were directly related to his work-related injury of November 12, 1987 and noted that the fall on the icy sidewalk curb constituted a probable mechanism of injury to both appellant's right ankle and right knee conditions.

In a merit decision dated February 9, 1998, the Office denied modification of the November 25, 1996 decision.[2]

By letter dated September 1, 1998, the Office authorized appellant to see Dr. Jerry S. Farber, a Board-certified orthopedic surgeon, for tarsal tunnel syndrome.

In a report dated September 28, 1998, Dr. Farber diagnosed sciatic entrapment and stated that it was related to the November 12, 1987 incident. He repeated his diagnosis again in his December 30, 1998 report.

In a February 2, 1999 report, the Office medical adviser reviewed Dr. Farber's report and opined that the sciatic nerve entrapment was not related to appellant's accepted injury.

On February 8, 1999 the Office denied appellant's request for decompression of the sciatic nerve of the right thigh was denied.

By letter dated February 8, 1999, appellant filed a request for reconsideration.[3]

In a merit decision dated June 14, 1999, the Office denied modification of the prior decision.

By letter dated April 24, 2000, appellant requested reconsideration.

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[2] In the memorandum attached to the order, the Office indicated that nearly all of the medical reports submitted by appellant including the June 8, 1997 medical report from Dr. Watkins were in the file when the case was reviewed by the Office hearing representative. The Office determined that the only new evidence submitted by appellant was the November 21, 1997 medical report of Dr. Lemmons and conducted a review of the case on the merits and concluded that modification of its prior decision was not warranted. The Office determined that Dr. Lemmons' report was not sufficiently rationalized because it did not explain how the right knee condition was related to the employment incident.

[3] The record reflects that he requested an oral hearing on February 26, 1999; however, it was premature as the case was not in posture. Along with his request were medical reports, including a report from Dr. Watkins dated June 8, 1997.

By decision dated May 26, 2000, the Office denied appellant's request for reconsideration of his claim on the grounds that the evidence submitted was repetitious and thus, insufficient to warrant a review of its prior decision.

By letter dated June 13, 2000, appellant filed another request for reconsideration and attached: a legal definition of the term leg; copies of Office regulations; notes from March 1987 to January 1988; and a copy of the Office's acceptance letter dated April 8, 1988.

By decision dated June 21, 2000, the Office again denied appellant's request for a merit review of his claim on the grounds that the evidence submitted was irrelevant and thus, insufficient to warrant a review of its prior decision.

By letter dated September 14, 2000, appellant again requested reconsideration and included a statement from a witness regarding the November 12, 1987 accident.

By decision dated October 19, 2000, the Office denied appellant's request as untimely and determined that appellant had not demonstrated clear evidence of error.

The Board finds that the Office abused its discretion in refusing to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[4] As appellant filed his appeal with the Board on May 9, 2001, the only decisions properly before the Board are those dated May 26, June 21 and October 19, 2000.

Section 8128(a) of the Federal Employees' Compensation Act[5] vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary in accordance with the facts found on review may --
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> (1) end, decrease or increase the compensation awarded; or
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> (2) award compensation previously refused or discontinued."

Under section 10.606(b)(2), a claimant may obtain review of the merits of the claim by submitting evidence and argument: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously

[4] *Oel Noel Lovell*, 42 ECAB 537, 539 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2) (1998) and 20 C.F.R. § 10.607(a) (1999).

[5] 5 U.S.C. § 8181 *et seq.*

considered by the Office. Section 10.608(b) provides that where the request is timely but fails to meet at least one of the standards described in section 10.606(b)(2), or where the request is untimely and fails to present any clear evidence of error, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[6]

In the instant case, the Office in its February 8, 1998 decision noted that the June 8, 1997 report of Dr. Watkins had previously been considered by the Office hearing representative and subsequently found the evidence to be cumulative in nature. However, the Office's prior decision was issued on November 25, 1996 and the Office hearing representative could not have considered the report of Dr. Watkins dated approximately seven months after the November 25, 1996 decision.

In his April 24, 2000 request for reconsideration, appellant argued, for the first time, that the Office had not ever reviewed Dr. Watkins' June 8, 1997 report. This argument, that evidence of record had not been reviewed on its merits or was evaluated in its June 14, 1999 merit decision was not raised until appellant properly pointed this out in his requests for reconsideration.

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence necessary to discharge his burden of proof. If the Office should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[7] Section 10.606(b) only specifies that the evidence be relevant and pertinent and not previously considered by the Office.[8]

[6] 20 C.F.R. § 10.608(b) (1999).

[7] *Paul Kovash*, 49 ECAB 350, 354 (1998).

[8] 20 C.F.R. § 10.606(b)(2)(ii).

The decision of the Office of Workers' Compensation Programs dated May 26, 2000 is hereby set aside and the case remanded for a merit review.[9]

Dated, Washington, DC
November 21, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] In light of the Board's decision, the issues regarding the denial of appellant's subsequent requests for reconsideration are moot.